IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29-01-2007

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE M. JAICHANDREN

O.S.A.NOs.196 & 197 OF 2001

O.S.A.No.196/2001

G. Sekar .. Appellant

Vs.

1. Geetha
2. G. Vijaya
3. Shanthi
4. R. Uma
5. G. Ramesh (deceased)
6. R. Latha Bai
7. Minor R. Shanthini Bai
   (Minor Rep. by R6)
   R6 & R7 brought on record
   as LRs of the deceased,
   5th respondent vide as per
   order of court dt.30.7.02
   made in CMP.10914/02 .. Respondents

O.S.A.No.197 of 2001

G. Sekar ... Appellant

Vs

1.Shanthi
2.R. Uma
3.L. Geetha
4.Vijaya Kishore
5.Jyothi Sukumar
6.Maya Prabhu
7.G. Ramesh (decd.)
8.R. Latha Bai
9.R. Santhini Bai (Minor)
  (Minor rep by next friend and Guardian R8)
(RR8 & 9 b/r as LRS of the decd
7th respondent vide as per order
of Court dated 30.7.2002 made in
Tr.C.M.P.10915/2002 by SJJ & KRPJ)

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Appeals filed under Clause 15 of the Letters Patent of Madras High Court read with Order 36 Rule 1 of O.S. Rules against the common judgment dated 14.12.2000 made in C.S.No.153 of 1996 and T.O.S.No.4 of 1998 by the learned single Judge.

For Appellant : Mr. Ramanarayanan
both O.S.As. for M/s.Sampathkumar & Associates

For Respondents 1to4: Mr.P.B. Balaji
Respondents : Mr.T.S. Sivagnana Sambandam for R6 and R7 in O.S.A.No.196/01
in O.S.A.No.197/01 : Mr.P.B. Balaji for R1 to R3
Mr. T.S. Sivagnana Sambandam for R8 & R9
R6 Left
R7 died

COMMON JUDGMENT

P.K. MISRA, J

These two appeals have been filed against the common judgment of the learned single Judge in C.S.No.153 of 1996 and T.O.S.No.4 of 1998 dated 14.12.2000.

2. The dispute relates to the property of one M.K. Govinda Singh. He had married one Sakunthala Bai. He has one son G. Sekar, the present appellant, and four daughters, namely, Geetha, Vijaya, Shanthi and Uma. Geetha and Vijaya filed C.S.No.153 of 1996 arraying the present appellant as Defendant No.1 and other two daughters as defendants 2 and 3, claiming partition of the property of Govinda Singh, who died on 9.1.1996. Sakunthala Bai, the mother of the parties, had already pre-deceased in the year 1992. Subsequently, a an application was filed by one G. Ramesh in C.S.No.153 of 1996 for being impleaded as a party to such suit on the allegation that the deceased Govinda Singh had also married one Saroja as second wife and had begotten two daughters and one son, namely, Jothi and Maya and Ramesh. On the basis of such allegation, Ramesh was impleaded as Defendant No.4. G. Sekar, the first defendant in C.S.No.153 of 1996, filed a written statement contending that Govinda Singh had not died intestate but he had left behind a Will bequeathing the suit property and other movable properties to the first defendant and, therefore, the plaintiffs had no right to seek partition to such properties. He also filed Testamentary Original Suit No.4 of 1998 for grant of Letters of Administration on the basis of such Will dated 29.11.1995. In such

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T.O.S.No.4 of 1998, four daughters of deceased Govinda Singh through Sakunthala Bai were impleaded as defendants 1 to 4 and two daughters and one son of Saroja, the alleged second wife of Govinda Singh, were impleaded as defendants 5, 6 and 7 respectively. Fourth defendant in C.S.No.153 of 1996 in his written statement contended that all the children of Govinda Singh through the first wife as well as the second wife are entitled to share and, therefore, each heir should get 1/8th share in the property. He had denied the genuineness of the alleged will.

3. On the basis of the pleadings, the following issues had been framed in C.S.No.153 of 1996 :-

> "(1) Whether the suit for partition by the daughters of the deceased M.K. Govinda Singh, who died intestate, is maintainable or not?
>
> (2) Whether the suit for partition by the daughters of the deceased M.K. Govinda Singh, who died intestate, is maintainable or not ?
>
> (3) Whether the alleged Will dated 29.11.1995 said to have been executed is genuine one and if so, who are the beneficiaries ?
>
> (4) Whether the first defendant is right in claiming right under the alleged Will, without obtaining probate ?
>
> (5) Whether the plaintiffs are entitled to 1/5th share each in the suit properties, left by the deceased, M.K. Govinda Singh ?

Subsequently, an additional issue was framed to the following effect :-

> "Whether the D-4 is entitled to have any share in the schedule property ? If so what is his share ?

In T.O.S.No.4 of 1998, two issues framed are as hereunder :-

> "1) Whether the Will of late M.K. Govinda Singh is true, valid and genuine ?
>
> 2) To what relief ?

4. Inevitably both the suits were taken up together. Learned single Judge has passed a preliminary decree for partition in C.S.No.153 of 1996 directing division of separate property into eight equal shares and has dismissed T.O.S.No.4 of 1998, obviously on the finding that the Will is not genuine.

5. G. Sekar, who was Defendant No.1 in the suit for partition and the sole legatee under the alleged Will, has filed these two appeals. O.S.A.No.196 of 2001 has been directed against the decree in C.S.No.153 of 1996 and O.S.A.No.197 of 1996 has been directed against the decree in T.O.S.No.4 of 1998.

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6. Learned single Judge took up issue No.1 in T.O.S.No.4 of 1998 relating to genuineness of the Will and connected Issue Nos.1, 3 and 4 in C.S.No.153 of 1996, which revolved around the validity of the Will together, and found that due execution of the Will had not been proved and there are many suspicious circumstances shrouding the Will which would lead to the conclusion that the Will might not have been executed by the testator with his free will and free mind.

While discussing Issue Nos.2, 5 and 6 and additional Issue in C.S.No.153 of 1996 and Issue No.2 in TOS.No.4 of 1998 together, the learned single Judge has came to the conclusion that Govinda Singh had a second wife by name Saroja through whom the defendants 5, 6 and 7 in TOS.No.4 of 1998 had been begotten and even though the marriage with second wife was void under Section 5(i) of the Hindu Marriage Act, the children through such void marriage are legitimate children entitled to succeed to the self-acquired property of Govinda Singh and on the aforesaid footing directed that each child of Govinda Singh would be entitled to 1/8th share in the disputed property. Learned single Judge further found that Section 23 of the Hindu Succession Act creating bar regarding division of dwelling house was not attracted as fourth defendant had claimed division in his written statement.

7. The common decision in both the matters is being challenged by the present appellant mainly on the following grounds :-

(1) Learned single Judge has erroneously concluded that due execution of the Will had not been proved and on the basis of such Will, T.O.S.No.4 of 1998 should have been decreed and C.S.No.153 of 19976 should have been dismissed.

(2) Even assuming that the Will is not genuine, the share allotted to Defendant Nos.5,6 and 7 in TOS.No.4 of 1998 is uncalled for and since they were children through the concubine, they were not entitled to the benefit of Section 16 of the Hindu Marriage Act and, therefore, share should be given to two plaintiffs and defendants 1, 2 and 3 in C.S.No.153 of 1996 in equal proportion of 1/5th.

(3) Once it is found that Defendant No.4 is not entitled to any share, Defendant No.1 in C.S.No.153 of 1996 being the only male heir, the dwelling house should not be directed to be partitioned.

8. Before considering the question of Will, it is more convenient to consider other two questions. It is contended by the learned counsel appearing for the appellant that the learned single Judge has erroneously assumed that the deceased Govinda Singh married for the second time and three children were begotten through such second wife. The only discussion rendered by the learned single Judge on the aspect relating to the second marriage is found

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in paragraph 25 of the judgment. Learned single Judge has observed as follows :-

> "25. The fourth defendant Ramesh has filed written statement to the effect that Govinda Singh had a second wife by name Saroja and she died during 1974 leaving behind two daughters an a son. This fact is not denied by the other parties."

9. The question is whether the learned single Judge was correct in coming to the conclusion that Govinda Singh had a second wife merely because such assertion made by Ramesh in the written statement had not been denied by the parties. G. Vijaya, the second plaintiff in C.S.No.153 of 1996 was examined as D.W.1. She has stated that one Saroja was "my father's concubine". Sekar, the plaintiff in TOS.No.4 of 1998 and Defendant No.1 in the connected partition suit was examined as P.W.2. In his examination in chief, he has stated that he had two elder sisters and two younger sisters, namely, Shanthi, Uma, Geetha and Vijaya. There is no suggestion to him that his father had married for the second time and Defendants 5, 6 and 7 in TOS.No.4 of 1998 had been begotten through such second wife. Defendant No.4 has not examined any witness to prove about the alleged second marriage. Merely on the basis of the assertion made in the written statement filed by him alleging that Govinda Singh had married for second time and had begotten three children is not sufficient to come to the conclusion that in fact there was a second marriage. In view of this, the question of applying Section 16 of the Hindu Marriage Act does not arise at all for consideration.

10. The second question is regarding applicability of Section 23 of the Hindu Succession Act, 1956, hereinafter referred to as "the Act". Learned single Judge has concluded that bar under Section 23 of the Act relating to partition of a dwelling house at the instance of a female heir was not applicable to the facts of the case on the finding that Ramesh, the son of deceased Govinda Singh through Saroja, was also entitled to a share and he had indicated in his written statement that property should be divided by giving him a share.

11. As per our finding already rendered, Ramesh cannot be considered as a heir because there is nothing on record to prove that in fact his mother had married the deceased. Once it is found that Ramesh is not a heir and the prooperty is required to be divided among five children, namely, one son and four daughters, the question of applicability of Section 23 of the Act would in normal course arise for consideration. Since Sekar is the only male heir, the question of partition of the property among the male heirs obviously cannot arise as has been observed by the Supreme Court in JT 1996(4)S.C.300 (NARASHIMAHA MURTHY v. SMT. SUSHEELABAI AND

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OTHERS) and therefore if Section 23 would be applicable, daughters cannot claim partition of the dwelling house, which was admittedly in the occupation of Sekar. However, it is to be noticed that Section 23 has been omitted by the Hindu Succession (Amendment) Act, 2005 (Act 39 of 2005) with effect from 9.9.2005. It is no doubt true that such amendment has come into force during pendency of the appeal. However, even assuming that there was any embargo at the time of filing the suit or passing the judgment by the learned single Judge as contemplated under Section 23 of the Act as it stood, in view of the amendment and deletion of such provision, it is obvious that there is no such embargo after 9.9.2005. In other words, after 9.9.2005 any female heir can seek for partition even in respect of a dwelling house. This subsequent event arising out of change in law is obviously to be applied and, therefore, the question of applying bar under Section 23 of the Act no longer arises for consideration.

12. The main question raised by the learned counsel appearing for the appellant relates to genuineness of the Will allegedly executed by the deceased Govinda Singh. As per the case of the appellant such Will was executed on 29.11.1995. In paragraph 4 of the petition for grant of Letters of Administration it has been simply stated that the Will was duly executed by M.K. Govinda Singh at Madras on 29.11.1995 in the presence of witnesses whose names appear at the foot thereof.

13. The propounder of the Will, who was arrayed as Defendant No.1 in C.S.No.153 of 1996 filed by two sisters for partition, had filed a written statement in such suit, wherein it has been simply stated that Govinda Singh had executed a Will on the said date bequeathing his properties to the first defendant and such Will had been filed in the court for probate.

14. In the written statement filed by the Defendant Nos.3 and 4 in TOS.No.4 of 1998, who were plaintiffs in the connected partition suit, it has been indicated that Govinda Singh had love and affection for his daughters and he was not in good terms with the plaintiff. It is specifically stated that the alleged Will was not a true and genuine document and Govinda Singh never used to affix his thumb impression anywhere and used to sign only in English. It is further stated that it was improbable and impossible for Govinda Singh to have executed a Will on 29.11.1995 at his residence and he used to sign the cheques and his limbs were very much active till the very end. Therefore, giving of thumb impression itself prove that the Will is not genuine. If the thumb impression in each of the pages of the alleged Will is compared, it would show that some force is applied and some manipulation is done. The date of admission and discharge from the hospital, which has been stated in the Will, were not at all correct. It is further

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stated that Govinda Singh did not have any family Advocate and Ms. Radhai who prepared the Will is a close friend of the propounder. Even the attesting witnesses are stage managed.

15. The Will has been typed in Tamil by a professional typist on the basis of the instructions of Ms. Radhai, an Advocate, who was examined as P.W.4. The Will has been purported to be attested by P.Ws.1 and 3. In addition to the above witnesses, the propounder was himself examined as P.W.2. On behalf of the defendants, G. Vijaya, the second plaintiff in C.S.No.153 of 1996, was examined as D.W.1.

16. Learned single Judge has disbelieved the due execution of the Will on the basis of several contradictions in the evidence of the witnesses as well as several suspicious features. The Will was drafted by P.W.4, an Advocate, who claims to be the family friend of Govinda Singh. She has stated :-

> "... The Will was executed by the testator in Devaki Hospital. I was informed by one Viswanathan that Govindasingh wanted me to meet him in the hospital. I find Viswanathan's signature in Ex.P.1 as attestor. On 29-11-95 at 10.00 A.M. I went to Devaki Hospital. I met Govindasingh. P.W.2 and P.W.3 were present in the hospital. P.W.2 going here an there in the hospital. The testator gave instructions to me to draft the will. I noted the instructions in a piece of paper, came to High Court an got the will typed. The will was typed by a typist who was available in the corridors. The typist was Miss. Terasa. At about 2.00 P.M. I went to the hospital on the same day, read the contents of the will to the testator, then he affixed his left thumb impression in the will. P.W.3 was present, then P.W.2 was outside the room. Because the testator's hands were shaking, he could not sign the will, therefore, he affixed his left thumb impression. Then, I signed the will. Thereafter, P.W.3 signed the will...."

17. P.W.3 in his evidence has never claimed that he was instructed by Govinda Singh to call P.W.4. If P.W.3 had not contacted P.W.4 to come to the hospital, it is not known on what basis P.W.4 came to the hospital. Both P.W.4 and P.W.3 claim that at the time when testator put his thumb impression, Sekar was not in the room and he was outside the room. However, Sekar, who examined himself as P.W.2, has stated that on 29.11.2005, when his father executed the Will in the hospital, he was present with him. Subsequently he has categorically stated "I saw Radhai and Viswanathan attesting the Will". In other words, even if the propounder claims that he was very much present at the time when the

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Will was executed and attested, the attesting witness and the person, who were allegedly present at the time of execution of the Will, claim that the propounder was not present in the room and he was outside. P.W.4 has stated that after the testator affixed his left thumb impression "... then I signed the Will. Thereafter P.W.3 signed the Will. ..." However, P.W.3 in his evidence stated that "I signed first in the Will and then Radhai signed". A mere look at the Will indicates that P.W.3 was the first attesting witness and P.W.1 was the attesting witness who has just signed below P.W.3 and thereafter P.W.4 has signed by indicating that the document had been prepared by her. P.W.1 is the other attesting witness. In his deposition he states that on 5.12.1995 he had gone to the residence of M.K. Govinda Singh. Govinda Singh told him that he had prepared a Will in the hospital and requested him to attest the Will and P.W.1 being the friend of Govinda Singh signed as the second attesting witness in the Will. In other words, he claims to have attested the Will after execution of the Will was acknowledged by the executant. In cross-examination it has been elicited from him that he had visited the house of Govinda Singh on 1.12.1995, but Govinda Singh had not disclosed anything about the Will. This witness had filed an affidavit dated 27.6.1998 in support of Application No.2705 of 1998 filed by Sekar in TOS.No.4 of 1998 seeking permission to examine this witness at an early date. In such affidavit, he had stated that he had attested the Will of late M.K. Govinda Singh on 29.11.1995. Similarly, Sekar in his affidavit filed in support of such Application has stated that this witness had attested the Will on 29.11.1995. This is a glaring contradiction in the evidence of P.W.2.

18. Apart from the above, it is noteworthy to indicate that the attesting witnesses had not put any date after their signatures and the date 29.11.1995 had been put by P.W.4, after the endorsement that Will has been prepared by her. P.W.4 claims to be a family friend of Govinda Singh. She claims that she had visited the testator's house very often. But, she does not know whether the testator's daughters were residing with him at the time of execution of the Will. Even she does not know the mother tongue of the testator, whose mother tongue admittedly is Hindi.

19. The affidavit purported to be made by the executant on 29.11.1995 before P.W.4, who also happens to be a notary public, affirming the Will is on record as Ex.P-2. The said affidavit has been apparently notarised by P.W.4. However, inspite of repeated and searching questions, P.W.4 has not produced the Register maintained by her which would have indicated whether the affidavit was notarised on that day or not.

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20. The proposal for preparing a Will emanated on 29.11.1995. P.W.4 claims that the stamp paper for the affidavit was purchased by her, but the stamp paper indicates as if it was purchased by the testator himself. At any rate, the date of purchase of the stamp paper is 11.10.1995. It is not understood as to why P.W.4 purchased a stamp paper on 11.10.1995 in the name of the testator and that too from a stamp vendor in Tiruvaiyaru, not at Madras, even though P.W.4 is admittedly a resident of Madras as also the testator. In this connection, it appears from the statement of P.W.3 in cross-examination that Govinda Singh had not signed any other paper apart from Ex.P-1 Will. P.W.4 had initially stated that she did not remember whether the testator had signed any other affidavit on 29.11.1995 apart from the Will. However, on re-examination she has stated that Ex.P-2 is the affidavit, which she had attested on 29.11.1995 in her office. She further stated that her previous statement that on 29.11.1995 the testator did not give any affidavit and that he gave an affidavit two or three days back is not correct.

21. It is no doubt true that P.W.4 belongs to a noble profession and ordinarily great weight is to be attached to such evidence. However, apart from the fact that several contradictions are available from the evidence, P.W.4 cannot be characterised as an independent witness as it is she who had given the reply notice Ex.D-3 on behalf of the propounder of the Will. At the time when she gave the reply, there is no whisper in such reply that in fact she had drafted the Will and attested the same. These are many of the aspects appearing from the evidence of P.Ws. 1 to 4 which create sufficient doubt regarding the due execution of the Will. It is of course true that many of the contradictions may appear to be innocuous in isolation. But, when all these contradictions are considered together along with the fact that thumb impression was given by the executant, even though he was obviously signing the document, and the fact that in the typed Will line-spacing in different pages appear to be irregular, they create sufficient doubt regarding the due execution and genuineness of the Will.

22. Learned counsel appearing for the appellant has of course submitted that P.Ws.1, 3 and 4, who are outsiders, have stated about the execution and attestation of the Will and there is no reason why such evidence should be discarded. However, we are unable to accept the contention that three witnesses concerned are independent witnesses.

23. We have already referred to the aspect that P.W.4 can be considered as interesting witness because it is she who had given the reply notice as Advocate on behalf of the propounder himself. P.W.1 has stated that during the lifetime of Govinda Singh he was helping in maintaining his accounts and thereafter he was helping

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his son Sekar in maintaining his accounts. It is of course true that nothing specific has been elicited from P.W.3 to show his interestedness. But, as already analysed, his evidence does not carry much conviction.

24. Learned counsel for the appellant has characterised the judgment of the learned single Judge as based on surmises and conjectures. However, we have independently considered the evidence and we find ourselves in agreement with the conclusions derived by the learned single Judge, who has merely highlighted various odd features in the case. It cannot be said that judgment of the learned single Judge is based on surmises and conjectures. On the other hand, the judgment is based on reasonable conclusions derived from the materials on record.

25. Learned counsel for the appellant has also submitted that when it was the specific plea of the defendants that the Will was forged, the burden was on the defendants to prove so.

We have referred to the relevant portion of the pleadings. The defendants have denied about the due execution of the Will. Obviously the initial burden was on the propounder of the Will to prove that there was due execution of the Will. In the present case, on analysis of the evidence, we are of the considered opinion that the propounder has failed to prove the due execution of the Will through cogent evidence. It is of course true that merely because the property was bequeathed to the son by excluding four daughters by itself may not be a suspicious circumstance, but since the propounder himself has failed to prove the due execution of the Will, we are unable to differ from the conclusion of the learned single Judge.

26. For the aforesaid reasons, O.S.A.No.197 of 2001 arising out of T.O.S.No.4 of 1998 is dismissed. However, the conclusion of the learned single Judge regarding the right of the defendant Nos.5, 6 and 7 in T.O.S.No.4 of 1998 cannot be accepted. O.S.A.No.196 of 2001 arising out of C.S.No.153 of 1996 is allowed in part and it is directed that two plaintiffs in C.S.No.153 of 1996 and the defendants 1, 2 and 3 in such suit are entitled to 1/5th share each in the disputed properties and no share is required to be given to Defendant No.4 in C.S.No.153 of 1996 / Defendant No.7 in T.O.S.No.4 of 1998 and Defendant Nos.5 and 6 in T.O.S.No.4 of 1998. However, the parties are directed to bear their own costs in the present appeals.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

dpk

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To

1. The Sub Assistant Registrar,
Original Side, High Court, Madras.

2. The Sub-Assistant Registrar, Judicial Section,
High Court, Madras.

3. The Record-keeper, V.R. Section, High Court, Madras

2 cc to Mr.P.B. Ramanujam, Advocate, sr. 5236 & 5237
2 ccs to M/s. Sampath Kumar, Associates, Advocate,Sr. 5112 & 5113

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MRD (CO)
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